

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

THOMAS ROCKWELL, et. al.,
Plaintiffs-Appellants,

v.

TRUSTEES OF THE BERKSHIRE MUSEUM, et al.,
Defendants-Appellees.

CONSOLIDATED WITH

JAMES HATT, et. al.,
Plaintiffs,

v.

TRUSTEES OF THE BERKSHIRE MUSEUM, et al.,
Defendants.

ON APPEAL FROM AN ORDER OF THE SUPERIOR COURT
FOR BERKSHIRE COUNTY

OPPOSITION TO MOTION FOR INJUNCTION PENDING APPEAL

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November 10, 2017

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Judicial Court Rule 1:21, Defendant Trustees of the Berkshire Museum is not owned by any parent corporation. No publicly held corporation owns 10% or more of Trustees of the Berkshire Museum.

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INTRODUCTION

Repeating the same course of conduct that the Superior Court correctly identified as "bewildering" and "astonishing," the Attorney General's Office ("AGO") asks this Court to grant -- in a matter of hours, and three days after the Superior Court's decision -- the precise relief that the Superior Court denied following its careful review of a record that spans well over 1,000 pages, including affidavits, exhibits, and hours of attorney argument. What is more, the AGO has delayed filing this appeal until the Friday afternoon before a Monday auction, despite the fact that the Superior Court issued its decision three full days ago, a tactic that this Court should not countenance.

The AGO's last-ditch effort to enjoin an auction scheduled to occur on Monday, November 13, which the AGO has known about for over four months, repeats arguments that have been made, considered, and rejected in a careful and thorough opinion that admits of no legal error, let alone an abuse of discretion. The AGO's request should be denied.

BACKGROUND

For over a century, the Berkshire Museum has existed for the purpose of "maintaining in the city of Pittsfield an institution to aid in promoting for the people of Berkshire County and the general public the

study of art, natural science, the cultur[al] history of mankind and kindred subjects by means of museums and collections." 1932 Mass. Acts & Resolves Ch. 134. Founded in 1903 and incorporated in 1932, the Museum was one of the first in the region, and for decades it prospered with the support of local industry. But in recent years, with a declining population and economy in the region, together with increased competition for charitable dollars, the Museum's financial base has eroded, and it runs an annual deficit of over \$1 million even as it continues to support local students and citizens, including the many who live below the poverty line. The Museum's dedicated base of supporters and attendees lack the financial capacity to support the Museum on their own. As the AGO admitted just a week ago in the oral argument held by the Superior Court, the Museum is in "serious financial trouble." Tr. at 57:7-13. Today, "it is beyond cavil that the Museum's financial outlook is bleak." Order at 3.

Faced with this unsustainable financial trajectory, the Museum's volunteer board engaged in a two-year process to assess how best to stabilize its finances to allow the Museum to continue to fulfill its mission of "maintaining" an institution to serve the Pittsfield community. The Museum engaged a professional consultant to advise this process and

formed formal stakeholder advisory groups; convened 22 focus groups involving more than 200 people including local children, museum members, and museum donors; and spent over 60 hours in Board meetings dedicated to evaluating, assessing, and devising a solution to the Museum's untenable financial situation. A-366, ¶¶ 26-52. As a part of this process the Board considered and, ultimately, determined, that deaccessioning several of the Museum's valuable artworks was a necessary component of the Museum's ongoing financial sustainability. A-375-76. The result of this "deliberate and careful review," Order 16, was a "New Vision" for fulfilling its purpose, financed by the deaccessioning and sale of 40 objects, including two paintings by Norman Rockwell, out of its 40,000-object collection.

Through a series of votes between May 22 and July 12, 2017, the Board voted to enter into an agreement with Sotheby's, to amend its collections policy, and to deaccession the forty works. On June 22 - more than four months ago -- the Museum notified the AGO of its plans, and identified the 40 objects to be sold. See Order at 10; A-408.¹

¹ The AGO's assertion that the Museum's June 22 letter "stated only that it was planning to undertake the sale of 'several' pieces of art" (Mot. at 4) is misleadingly incomplete. Compare A-1122 ¶ 24 (On June 22, 2017, the Museum notified the AGO in writing that it was planning to undertake the sale of 'several'

In the four months that followed, the Museum fully cooperated with the AGO's investigation. This investigation included over 20 interviews, meeting with Museum officials in Pittsfield, 20 calls with Museum counsel, and over 400 contacts with third parties. Order at 10. On September 6, Sotheby's announced that several paintings, including the Rockwells, would be auctioned on November 13. Order at 10.

In late October, two groups of private plaintiffs sought preliminary injunctions halting the auction. On October 20, Judge Agostini scheduled a hearing for November 1. On October 30, the AGO filed a response in support of a preliminary injunction, explaining that it had "concerns" with the Museum's plans but that "[t]his Response does not represent the AGO's final position." SA-2.

On November 1, Judge Agostini held a two-and-a-half-hour hearing on the private plaintiffs' motions for a preliminary injunction. At the hearing, the AGO conceded that the Museum had not acted in bad faith. Judge Agostini pointed out to the AGO at that hearing

pieces of art...."), and SRA-23, 103:10-11 (AAG Aladro: "And just to be clear, the letter presented this as a simple sale of several paintings and objects...."), with Order at 10 ("In fact, this [June 22] missive provided the AGO with a list of the items that it planned to sell, including the Rockwell paintings."), and A-408 (June 22, 2017 letter to AGO providing list of 40 works to be sold).

that its supposed "support" for the private plaintiffs' motions was ineffectual, and that it had not itself sought an injunction. Several hours later, the AGO moved to "convert the Attorney General's status ... from defendant to plaintiff in the event that the Court determines that current plaintiffs lack standing." A-1105-1106. Without any justification for its delay, the AGO filed cross-claims the following day.

On November 7, Judge Agostini issued a 25-page order denying the preliminary injunction and dismissing the private plaintiffs seeking to enjoin the November 13 sale for lack of standing.² This careful decision considered and rejected every argument the AGO raised before the Superior Court and repeats in its motion for an injunction pending appeal: First, that a restriction in the Berkshire Athenaeum's 1871 charter restricts the Berkshire Museum's sale of works acquired prior to its 1932 incorporation. A-1125 ¶ 49-61; Order at 17-19 ("[T]he Museum is not restricted from using objects received from the Athenaeum in a manner that removes those objects from Pittsfield."). Second, that the two Rockwell paintings were subject to implied restrictions. A-1125, ¶ 62-73; Order 19-21 ("[T]here

² Judge Agostini did not dismiss plaintiffs Tom Patti and Tom Patti Design LLC, which brought a separate breach of contract claim not at issue in this appeal.

is no evidence before this court that Rockwell ever said -- to anyone, let alone the Museum -- that he wanted these paintings to remain with the Museum...."). Third, that the sale of 40 pieces of art would amount to a change in the Museum's purpose. A-1125, ¶ 74-85; Order at 22-23 n.25 ("[T]he core purpose of the Museum is not merely the preservation of art—it is to promote art, natural science, and cultural history."). And fourth, that the Trustees breached their duty of care. Compl. ¶ 86-93; Order at 13-16 ("The Trustees' decision was not unreasonable for any reason raised by the Attorney General.... [T]hey undertook a deliberate and careful review of the available options and chose what they believed to be the appropriate course.").

Judge Agostini concluded that "[i]t is bewildering that the AGO would seek such an injunction, at such a cost, when its investigation has uncovered no evidence of bad faith, no conflict of interest, no breach of loyalty, no express gift restrictions, and yielded unconvincing evidence of implied gift restrictions or a breach of reasonable care during a two-year decision-making process." Order at 24.

Counsel for the Museum contacted the AGO on Tuesday, Wednesday, and Thursday of this week to ask whether the AGO would appeal. At approximately 10:00

p.m. on Thursday, November 9, the AGO informed the Museum that it was likely to file an appeal seeking an injunction halting Monday's auction. Shortly before noon on November 10, the AGO filed this motion.

Despite having had three days to attempt to secure such relief from Judge Agostini, the AGO suggests that seeking a stay from the lower court was somehow "not practicable," when in fact the AGO's inability to follow the procedures required by Rule 6(a) are simply the result of the AGO's continued failure to act with any reasonable diligence in relation to the Museum.

STANDARD OF REVIEW

Applications for injunctions under Rule 6(a) "are subject to the same standards as those for preliminary injunctions." Griffin v. Boston Housing Authority, 92 Mass. App. Ct. 1102 (citing C.E. v. J.E., 472 Mass. 1016, 1017 (2015)). Under that standard, a reviewing court may grant relief **only** if the appellant demonstrates a "likelihood of **appellant's** success on the merits," C.E., 472 Mass. at 1017 (emphasis added), or, in other words, a likelihood that the **appellant** will prevail on appeal.

This Court will review the Superior Court's denial of a preliminary injunction for abuse of discretion. See Fordyce v. Town of Hanover, 457 Mass. 248, 256 (2010). Under this standard, the appellate

court must decide “whether the [trial court] applied proper legal standards and whether there was reasonable support for [its] evaluation of factual questions.” Commonwealth v. Fremont Inv. & Loan, 452 Mass. 733, 741 (2008). An appellate court reviewing the denial of a preliminary injunction “will not reverse if there is a supportable legal basis for the trial court’s action.” Bank of New England, N.A. v. Mortgage Corp. of New England, 30 Mass. App. Ct. 238, 245 (1991) (internal quotation and brackets omitted). In other words, an appellate court “must take special care not to substitute [its] judgment for that of the trial court where the records disclose reasoned support for its action.” Edwin R. Sage Co. v. Foley, 12 Mass. App. Ct. 20, 26 (1981).³

ARGUMENT

I. THE AGO FAILED TO COMPLY WITH RULE 6(A)

A Rule 6(a) motion “must ordinarily be made in the first instance in the lower court,” unless “the motion [shows] that application to the lower court for the relief sought is not practicable.” Mass. R. App. P. 6(a)(1). The AGO concedes that it did not seek

³ Notably, despite citing a number of inapposite cases and articulating the incorrect standard in its brief, the AGO nonetheless appears to acknowledge that this Court can only issue an injunction pending appeal under Rule 6(a) if it finds an abuse of discretion. See Mot. at 7 (arguing that “[t]he trial court committed errors of law and abused its discretion in denying the preliminary injunction”).

this relief in the trial court, suggesting that it would have been impracticable to do so. Mot. 1. But it is the AGO's own inexcusable delay, not impracticability, that prevents the AGO from seeking relief from the lower court in the first instance.

The Superior Court issued its decision on the afternoon of November 7 -- almost three days before the AGO filed its motion in this Court. During those three days, AGO did not even attempt to seek relief from the trial court. Given the AGO's efforts to obtain a ruling from this Court within three days (i.e., before the scheduled auction), there is no reason why the AGO could not have made the identical request of the lower court earlier this week. Having failed to follow Rule 6(a), AGO's motion should be denied.

II. THE AGO HAS NO LIKELIHOOD OF SUCCESS ON APPEAL

The AGO offers no reason to believe AGO would prevail on appeal, and no basis upon which to enter an injunction. It recycles arguments that it already offered to the Superior Court, which gave them full consideration and rejected them. Thus, it begins by insisting that the Museum's sale of 40 items would "violate charitable trusts" and "the duty of care." But the Superior Court rightly held that "the doctrine of constructive trusts does not apply," Order 16, and that "there is no evidence that the Trustees afforded

this decision less than reasonable care." Order 16. The AGO offers no explanation for its implicit proposition that it is likely to convince a panel of this Court that the lower court abused its discretion. It plainly did not.

A. The Scheduled Sale Is No Breach Of Trust

The AGO's arguments that the sale of 40 objects out of the Museum's 40,000-object collection would amount to a breach of its charitable purpose rely, as they did in the lower court, on mischaracterizations of the Museum's purpose and blithe disregard for the evidence in the record.

The Museum's 1932 charter sets out an interdisciplinary purpose:

[E]stablishing and maintaining in the city of Pittsfield an institution to aid in promoting for the people of Berkshire County and the general public the study of art, natural science, the cultur[all] history of mankind and kindred subjects by means of museums and collections.

1932 Mass. Acts & Resolves Ch. 134 (emphasis added). The Museum has not, and will not, deviate from this purpose with its New Vision. Its focus has always been on art, history, and science, and will continue to focus on these disciplines by means of its 40,000-object collection, which includes approximately 5,000 works of art. See Order at 3, 23 n.25; A-221, ¶¶ 13-23. The AGO's assertion to the contrary is flatly contradicted by the plain language of the Museum's

charter. See Order at 23 n.25 (“[A]s stated, the core purpose of the Museum is not merely the preservation of art--it is to promote art, natural science, and cultural history.”).

Likewise, the AGO’s assertion that “the Museum itself conceded that the New Vision will focus on natural science and cultural history and add to endowment—purposes outside of promoting art” (Mot. 7) is simply incorrect. The record includes a sworn affidavit explaining that the New Vision will allow the Museum to display more art than ever before. A-226-227 (¶¶ 20-21), A-323-329. The AGO offers neither competing evidence nor any other basis for challenging this affidavit (Mot. 7-8), instead asking the Single Justice to reverse the factual findings of a Superior Court judge based on attorney assertions of facts that are not only unsupported, but directly contrary to the evidence in the record.

The AGO uncharitably attributes “err[or]” to Judge Agostini’s simple acknowledgment that should the Museum seek, in the future, to use the sale proceeds to depart from its purpose, a petition to the probate court seeking a deviation would be necessary. Mot. 7-8. But the Museum intends, and Judge Agostini found, no such deviation. Order 22-23. Judge Agostini’s conclusion that the AGO’s use-of-funds arguments were premature does not amount to a conclusion that these

arguments have any merit.⁴

B. There Is No Restriction On The Rockwell Paintings

The AGO's arguments that the sale of two Rockwell paintings that have been on display at the Museum for fewer than five of the past 20 years would "breach charitable trusts," Mem. 9-10, is, again, a tired recitation of the same arguments rejected by the Superior Court. In a half-hearted effort to put their defeated claims into an appellate posture, the AGO suggests without citation or explanation that the Superior Court "assumed facts about the artist that were not in evidence," and thus "erred in ignoring restrictions" on the two Rockwell paintings. Mot. 9. The AGO does not support this theory by specifying exactly what "assumed facts" it refers to or why the Superior Court was wrong.

Instead, it repeats its hypothesis that a thank you note sent from the Museum's director using the phrase "permanent collection" signaled an agreement that the paintings would "remain" in the Museum forever (Compare SA-12 with Mot. 9). The Superior Court rightly rejected this argument based on actual

⁴ AGO's final argument on this issue, that the Museum has failed to make the showing of "impossibility or impracticability" that would be required in a probate court action if it sought to change its purpose beyond solely the promotion of art, layers a hypothetical on top of a falsity. Mot. at 8 n.3. No such showing is necessary: the Museum is not changing its purpose.

evidence submitted by the Museum in the form of affidavits, finding that "permanent collection...implies no actual permanency." Order at 20.

Next, the AGO repeats that "Norman Rockwell had a great affinity for the Museum and a long-standing friendship with Director Stuart Henry" (Compare SA-13 with Mot. 2). The Superior Court also rejected this claim: "Henry's thoughtfulness in his dealings with Rockwell and his art was natural under the circumstances and thus is in no way suggestive of some express obligation." Order at 21.

The Superior Court also considered and rejected the AGO's claim that "[a]t the time Rockwell donated his works of art, it was accepted as a 'given' that the works would be permanently retained in the collection" (SA-15), noting "If deaccessioning was so unheard of [at the time] that Rockwell would not have thought to have restricted the Museum's right to deaccession his artwork, it suggests he did not restrict the Museum's rights in that fashion." Order at 20.

Finally, the AGO repeats that the paintings are restricted because Rockwell "took steps to secure his art for the public" in a subsequent, and unrelated, 1972 trust. (Compare SA-15-16 with Mot. 3). This argument too was considered and rejected as a matter of both law and fact by the Superior Court. See Order

at 21 ("The trust, and some of the correspondence, are dated after the time of Rockwell's gifts and are therefore irrelevant to the issue of his donative intent." And "the sum total of the evidence tends to show that Rockwell simply wanted to benefit the Museum that he particularly enjoyed.").

On each of these points, the AGO does not offer any argument for **why** any of the Superior Court's conclusions were legally or factually incorrect. Instead, it repeats its rejected theories in an attempt to force this Court's hand through a last-minute filing that the AGO apparently hopes will create enough confusion to prevent the sale. This irresponsible attempt to re-litigate lost claims, without any argument to support reversal of the Superior Court's carefully reasoned conclusions, should be rejected.

C. Athenaeum Charter Does Not Bind The Museum

The AGO repeats its argument that the 1871 incorporating act of the Berkshire Athenaeum restricts the ability of the Berkshire Museum to sell its own property pursuant to its authority under its own incorporating act, passed in 1932. Mot. 10-12. This argument is incorrect (Order 15), but more to the point, it has no bearing on the requested injunction pending appeal, as the AGO is well aware, there are no pre-1932 works scheduled to be sold on Monday November

13.

D. The Board Complied With Its Fiduciary Duty

As Judge Agostini found and as the AGO conceded, the nearly two-year process by which the Board developed the New Vision and deaccession plans was "a deliberate and careful review," Order at 16, one which "included careful planning and consideration," SA-21. As the AGO concedes (Mot. 12), the relevant standard is set by statute:

A director [of a public charity] ... shall perform his duties ... in good faith and in a manner he reasonably believes to be in the best interests of the corporation, and with such care as an ordinarily prudent person in a like position with respect to a similar corporation organized under this chapter would use under similar circumstances.

G.L. c. 180, § 6C.5

The AGO has not alleged that the Trustees did not act in a manner they "reasonably believe[d] to be in the best interests" of the Museum. See Mot. 11-14. Having conceded both the thoroughness (SA-21) and the good faith (Mot. 11-14) of the Board's decisionmaking process, AGO is left only to challenge the weight the Board accorded to particular considerations and the merits of its ultimate decision. Mot. 11-14. Such

⁵ AGO relies on a case that predates this statute to suggest a higher standard. Mot. at 11-12; Order at 13. Judge Agostini made clear that whether or not such a higher standard applies, the Board satisfied it. See Order 13-16.

matters are properly left to the discretion of a diligent Board working in good faith. And the AGO has shown no basis for overturning the careful findings of Judge Agostini, especially where, as here, those findings are uncontradicted by anything other than attorney assertions in an appellate brief.

In light of this posture and these facts, it is truly remarkable for the Attorney General of this Commonwealth to suggest that the Single Justice must substitute the AGO's opinions for those of the Superior Court and Board because "judicial review of decisions within the AGO's executive discretion amounts to an intolerable interference." Mot. 13-14 n.8. Under G.L. c. 180, § 6C, it falls to the boards of the Commonwealth's public charities to chart their course, subject to review by the courts as to whether they have breached their fiduciary duty. The AGO does not have the last word, whether it deems judicial review "intolerable" or not.

The wisdom of the established c. 180, § 6C standard, and judicial review thereunder, is underscored by the extraordinary authority AGO has asserted in this litigation, under which the minutiae of public charity decisionmaking would be subject to the approval of a small group of government lawyers. The AGO's briefing in the court below asserted the power to police not whether the Museum fulfills its

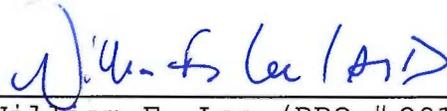
purposes, but "how the Museum fulfills its purposes." SA-17 (emphasis added). It went on to dismiss "the significance and value" of the Museum's remaining 5,000 works of art, to proclaim that interactive exhibits "quickly become dated," and to complain that the Museum's New Vision will not make sufficient use of loans. Id. 18-19 & n.13. The AGO's motion on appeal engages in further meddling: the Museum's plans would fund renovations and a long-term endowment when short-term solutions might suffice (Mot. 12-13), its decision was accompanied by a change in collection policies (Mot. 13), and the Museum struck the wrong balance between financial sustainability and relationships with museum associations (Mot. 14).

The AGO might come up with a different plan, were they members of the board the Museum. Or they might, were they to engage in the same two-year process, arrive at the same plan. But a diligent Board, working in good faith, decided on this approach, and "undertook a deliberate and careful review of the available options and chose what they believed to be the appropriate course." Order at 16. The AGO offers no basis for reversing this finding, and the motion for an injunction pending appeal should be denied immediately to avoid any further harm to the Museum, beyond what the AGO's remarkable conduct and assertions have already caused.

CONCLUSION

The motion for injunction pending appeal pursuant to Mass R. App. P. 6(a) should be denied.

November 10, 2017 Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Andrew S. Dulberg, hereby certify, under the penalties of perjury that on November 10, 2017, I filed the foregoing Clerk of the Court of Appeals via the Court's electronic filing service and served by email and overnight delivery on counsel of record listed below:

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I further certify that the foregoing document was served by email and overnight delivery on this day with Associate Justice John A. Agostini or the Superior Court for Berkshire County.


Andrew S. Dulberg (BBO # 675405)